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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MILBURN MIKE LUNGHI,

Defendant and Appellant.

A093972

(Contra Costa County
Super. Ct. No. 000566-0)

I. INTRODUCTION

A jury convicted Milburn Mike Lunghi (Lunghi) of several offenses relating to a shooting incident in a parking lot outside a bar. The trial court found Lunghi had three prior strike convictions and two prior serious felony convictions. Lunghi was sentenced to a total term of 42 years to life in state prison.

On appeal, Lunghi argues that (1) his sentence violates Penal Code section 654,¹ (2) he is entitled to have a jury decide whether his prior convictions constituted strikes, (3) there is insufficient evidence to support the trial court's finding that Lunghi's 1979 burglary conviction constitutes a serious felony, and (4) the prior conviction allegations cannot be retried.

We find that section 654 requires a modification of Lunghi's sentence and that there is insufficient evidence to support the court's serious felony finding with respect to

¹ All statutory references are to the Penal Code unless otherwise indicated.

the 1979 burglary. We reject Lunghi's remaining contentions and otherwise affirm the judgment.

II. FACTS AND PROCEDURAL BACKGROUND

A. *The Shooting Incident*

On the evening of September 3, 1999, Lunghi had an argument with William Harp at Shorty's Bar in Martinez. Harp wanted Lunghi to leave the bar because he claimed he and Lunghi had been in prison at the same time and that Lunghi was a child molester. Later, when Harp left the bar, Lunghi fired five shots at Harp, hitting him once in the groin area. Camela Olson, who had been at Shorty's, was leaving the parking lot when she saw Lunghi standing outside near a car. Lunghi fired two shots at Olson. One bullet passed through the driver's side door and grazed Olson's ankle. The other bullet hit Olson's tire.

Harp refused to cooperate with the prosecutor in this case and testified at trial that he did not remember anything that happened on the night of the shooting. The prosecutor relied on prior statements Harp made to police and on the testimony of percipient witnesses. In addition, the prosecutor introduced evidence that, while Lunghi was being detained in connection with this case, he told a fellow inmate that he had shot another man "in the balls."

At trial, Lunghi denied that he shot Harp or Olson or that he possessed a firearm on September 3. Lunghi testified that Harp falsely accused him of being a child molester. Lunghi denied the accusation but did nothing more because he did not want to get in any trouble that might lead him back to prison. Lunghi told the jury that a companion named Joe Freitas, who was deceased at the time of trial, was angry that Lunghi did not defend himself. According to Lunghi, Freitas fired shots into the parking lot at Shorty's while Lunghi was waiting for him in a car.

B. *The Verdict and Lunghi's Sentence*

A jury convicted Lunghi of two counts of assault with a semiautomatic firearm (§ 245, subd. (b)), and one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1).) The jury also found true enhancement allegations for personal use of a

firearm (§ 12022.5, subd. (a)(1)) and for personally inflicting great bodily injury (§ 12022.7, subd. (a)).

Lunghi waived a jury trial with respect to the prior conviction allegations. The trial court found Lunghi had three prior strike convictions (§§ 1170.12, 667, subds. (b)-(i)) and two prior serious felony convictions (§ 667, subd. (a)(1)). Lunghi was sentenced to three concurrent terms of 25 years to life for the three current offenses, a consecutive four-year term for the firearm use enhancement, a consecutive three-year term for the great bodily injury enhancement, and two consecutive five-year terms for the serious felony conviction enhancements.

III. DISCUSSION

A. *The Concurrent Sentence for the Felon-in-Possession-of-a-Firearm Offense*

Lunghi argues that the concurrent sentence imposed for his count 3 conviction for possession of a firearm by a felon violates section 654 because that possession was part of a single, indivisible course of conduct.

Section 654, subdivision (a), states in relevant part that “[a]n act or omission that is punishable in different ways by different provisions of law shall . . . in no case . . . be punished under more than one provision.” “The purpose of section 654 is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense—the one carrying the highest punishment. [Citation.] The ‘act’ necessary to invoke section 654 need not be an act in the ordinary sense of a separate, identifiable, physical incident, but may instead be a ‘course of conduct’ or series of acts violating more than one statute and comprising an indivisible transaction punishable under more than one statute.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135. fn. omitted.)

“Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of

each individual case. [Citation.] Thus where the evidence shows a possession distinctly antecedent and separate from the primary offenses punishment on both crimes has been approved. [Citations.] On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense. [Citations.]” (*People v. Venegas* (1970) 10 Cal.App.3d 814, 821.)

In the present case, the trial court stated that the firearm possession was part of the same transaction as the assaults. Acknowledging this fact, the People opine that the court intended to stay the sentence for this offense but inadvertently imposed a concurrent term. In any event, the People concede that Lunghi’s possession of the firearm was not antecedent to or separate from the primary assault offenses. Thus, the sentence for the felon-in-possession-of-a-firearm offense must be stayed pursuant to section 654. (See *People v. Bradford* (1976) 17 Cal.3d 8, 22-23; *People v. Venegas*, *supra*, 10 Cal.App.3d at p. 821.)

B. *The Prior Conviction Findings*

Lunghi argues that he was entitled to a jury trial on the question whether his prior convictions qualified as strikes under California’s three strikes law. As Lunghi concedes, California law does not afford defendants this right. (*People v. Kelii* (1999) 21 Cal.4th 452 (*Kelii*)). “[T]he statutory right to have a jury decide whether the defendant ‘has suffered’ (§§ 1025, 1158) the prior conviction does not include the inquiry whether the conviction qualifies as a strike.” (*Kelii*, *supra*, 21 Cal.4th at p. 457.)

Lunghi argues that California’s “limited statutory right to a jury trial on the truth of prior conviction allegations” violates due process to the extent it fails to include the right to a jury trial on the question whether the prior conviction qualifies as a strike. Our Supreme Court has rejected this argument as well. As the Court recently explained, “[t]he right, if any, to a jury trial of prior conviction allegations derives from sections 1025 and 1158, not from the state or federal Constitution.” (*People v. Epps* (2001) 25 Cal.4th 19, 23 (*Epps*); see also *In Re Taylor* (2001) 88 Cal.App.4th 1100, mod. 89 Cal.App.4th 406d.)

Lunghi’s federal constitutional argument is based on *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] (*Apprendi*). In that case, the United States Supreme Court found that a New Jersey statute which increased the penalty for unlawful firearm possession upon a court finding that the defendant’s conduct fell within the state’s “hate crime” law was unconstitutional because it violated the defendant’s Sixth and Fourteenth Amendment right to a jury trial on every element of a charged crime. (*Apprendi, supra*, 530 U.S. at pp. 476-497.) The *Apprendi* court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490.)

Lunghi narrowly construes the express exception set forth in the *Apprendi* rule and argues that, while a court may decide the fact of a prior conviction, a jury must decide whether that prior constitutes a strike. The People construe the rule differently and maintain that *Apprendi* does not apply to prior conviction enhancements at all.

We reject Lunghi’s interpretation of the *Apprendi* rule for two important reasons. First, the *Apprendi* court was asked but declined to hold that a defendant has a constitutional right to a jury trial on a recidivist enhancement when that issue is contested. (*Apprendi, supra*, 530 U.S. at pp. 489-490.) Thus, *Apprendi* did not overrule the Court’s earlier decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*). *Almendarez-Torres* holds, among other things, that a court rather than a jury may determine whether a recidivist penalty provision applies because such a provision is a “sentencing factor” and not a separate element of the crime. (*Id.* at pp. 239-247.)

Second, in *Kelii, supra*, 21 Cal.4th at pages 456-457, our own Supreme Court held that a defendant does not have a right to a jury trial on the question whether his prior constitutes a strike. After *Apprendi* was decided, the court declined to overrule *Kelii* or reconsider its holding in that case in light of *Apprendi*. (*Epps, supra*, 25 Cal.4th at p. 28.)

As Lunghi ultimately concedes, this court is bound by *Kelii* and *Epps*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) Thus, we reject Lunghi’s

contention that the court trial of the prior strike allegations violated his due process rights.

C. *The Serious Felony Conviction Enhancements*

The trial court found that Lunghi's October 15, 1979 conviction for second degree burglary (the 1979 burglary) was a serious felony and thus qualified as both a prior strike (§ 667, subds. (b)-(i)) and a prior serious felony (§ 667, subd. (a)(1)). Lunghi contends there is insufficient evidence in the record that the 1979 burglary was a serious felony under these statutes.

At the trial on the enhancement allegations, the prosecutor submitted a copy of an information alleging that "on or about June 11, 1979 . . . [Lunghi] did . . . unlawfully, willfully, and feloniously enter the dwelling house of Vincent Flores, located at 725 - 16th Street, with the intent to commit theft." The People also submitted a copy of a November 9, 1979 abstract of judgment which indicated that Lunghi was convicted by a jury of second degree burglary and was sentenced to a five-year prison term.

Only first degree burglary qualifies as a serious felony under the relevant enhancement statutes. (§ 1192.7, subd. (c)(18).) In the present case, the prosecutor argued that the 1979 burglary constituted a serious felony even though the abstract indicated that Lunghi was convicted of second degree burglary. According to the prosecutor, the information was sufficient evidence that the 1979 burglary would constitute first degree burglary under the present law because the charging allegations indicated that the burglary was committed in a dwelling house.

As the People concede in this court, the prosecutor's argument was flawed. The abstract of judgment showed only that Lunghi was convicted of second degree burglary. Although the prosecutor was entitled to go behind the judgment and submit evidence that Lunghi had in fact committed a serious felony, he failed to do so. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 262.) Standing alone, the charging allegations that the burglary was committed in a residence does not constitute substantial evidence that the 1979 burglary was a serious felony. (Compare *People v. Guerrero* (1988) 44 Cal.3d 343, 345.)

Thus, the People and Lunghi agree that the five-year enhancement imposed pursuant to section 667, subdivision (a)(1), because of the 1979 burglary must be reversed. The parties also agree that, because Lunghi has two other prior strike convictions, the court's error does not affect the enhancement imposed pursuant to section 667, subdivisions (b) through (i).

D. *Retrial*

Lunghi contends that a retrial on the question whether the 1979 burglary constitutes a serious felony is barred by double jeopardy, res judicata and collateral estoppel.

In *People v. Monge* (1997) 16 Cal.4th 826, 829, our Supreme Court held that double jeopardy principles do not apply to determinations as to the truth of prior felony allegations in noncapital sentencing proceedings. The United States Supreme Court expressly affirmed that holding in *Monge v. California* (1998) 524 U.S. 721, 734 (*Monge*). After the decision in *Monge*, the California Supreme Court again held that “the state and federal prohibitions against double jeopardy do not apply to noncapital sentencing determinations.” (*People v. Hernandez* (1998) 19 Cal.4th 835, 837.)

Lunghi argues that *Apprendi, supra*, 530 U.S. 466, “appears to undermine the holding” in *Monge* and cases that follow it. We disagree. As discussed above, the *Apprendi* court excepted prior conviction determinations from its analysis. (*Apprendi, supra*, 530 U.S. at p. 490.) It also expressly distinguished *Monge* as a recidivist case involving distinctly different issues. (*Id.* at p. 488, fn. 14.) “Clearly, a plain reading of *Apprendi* refutes [the] conclusion that *Apprendi* ‘superceded’ the *Monge* decisions We therefore conclude that the *Monge* decisions remain extant and that they govern.” (*Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296, 1303.) Indeed, that authority is binding on us. (*Ibid.*)

Alternatively, Lunghi argues that principles of res judicata and law of the case preclude retrial of the prior serious felony allegation. To support this argument, Lunghi cites *People v. Mitchell* (2000) 81 Cal.App.4th 132 (*Mitchell*). Relying on the equitable principles Lunghi now invokes, the *Mitchell* court found that a prior serious felony

enhancement which had been twice reversed by the appellate court could not be retried. The court reasoned that “the procedural context of this case provides the requisite showing of finality, akin to an acquittal of an offense, for purposes of applying the equitable doctrines of res judicata and law of the case in the matter before us.” (*Id.* at p. 155.)

Mitchell is readily distinguishable because of its peculiar procedural history. In any event, we join several courts in disagreeing with the *Mitchell* court’s reasoning and conclusions. (*People v. Scott* (2000) 85 Cal.App.4th 905, 916-926; *Cherry v. Superior Court, supra*, 86 Cal.App.4th at pp. 1303-1304; *People v. Franz* (2001) 88 Cal.App.4th 1426, 1454-1455.) We need not repeat the lengthy critiques set forth in these published cases. Suffice to say we agree with them and particularly with the conclusion that the element of finality, which is the cornerstone of the equitable doctrines mistakenly invoked, “cannot exist in the context of successive hearings which take place in the *same* proceeding or action.” (*People v. Scott, supra*, 85 Cal.App.4th at p. 918.) We also acknowledge our obligation to follow *People v. Morton* (1953) 41 Cal.2d 536, a case in which our Supreme Court ordered a new trial on a prior conviction allegation after a habitual criminal finding was reversed for insufficient evidence and expressly stated that “[t]his procedure is the proper one.” (*Id.* at p. 544.)

Thus, contrary to Lunghi’s contention, a retrial on the prior serious felony allegation is permissible.

IV. DISPOSITION

The trial court’s finding that the section 667, subdivision (a) enhancement pertaining to the 1979 burglary conviction is true is reversed and this case is remanded for a retrial of the enhancement allegation. The abstract of judgment is ordered modified to stay the sentence on the section 12021

conviction (count 3) and to strike the five-year prior conviction enhancement relating to the 1979 burglary. The judgment is otherwise affirmed.

Haerle, J.

We concur:

Kline, P.J.

Ruvolo, J.